In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1390

JOHN PAUL JONES AND RUTH J. RUBEL JONES,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The ultimate question in this case is the proper characterization—as ordinary income or capital gain—of payments petitioner [1] received under an agreement she entered into with Continental Casualty Company at the time she entered into another agreement to sell all the stock in her corporate insurance agency to Forrest T. Jones.[2] Under her contract with Continental, petitioner agreed to serve for ten years, on request, as a consultant to Continental in the solicitation and

[1] "Petitioner" refers to Ruth J. Rubel Jones. Her husband, John Paul Jones, is a party to this litigation solely because they filed joint returns.

[2] The $50,000 received under the latter agreement is conceded to be capital gain.

807-992—68

underwriting of teachers' group insurance. Continental agreed to pay petitioner five per cent of premiums on any insurance written through Continental by Forrest T. Jones or the agency he purchased from petitioner.

In a timely suit for refund, a jury rejected petitioner's argument that the agreement with Continental implemented the sale of her agency and provided for additional payments of purchase price, finding instead that the payments were for services that petitioner rendered or agreed to render to Continental. The court of appeals affirmed, holding (Pet. A5) that the evidence supports the jury's verdict, and rejecting petitioner's contentions that the trial judge had committed reversible error in excluding proffered exhibits and testimony and in refusing to give a requested instruction.

There is no basis for further review. The issues on which petitioner now focuses—whether her agreement with Continental was in reality a covenant not to compete, and if so, whether the courts could apportion part of her receipts to such a covenant—were not raised at trial or on appeal. Those contentions are in any event based upon a factual assumption—that Continental's

payments constituted part of the purchase price for her stock—that the jury rejected.[3]

The only question tendered here that was raised below is (Pet. 27–29) whether the trial court erred in declining to instruct the jury on the possibility that Continental's payments were for goodwill. As the court of appeals held (Pet. A7–A8), the record was without an adequate evidentiary basis for such an instruction, and even now petitioner points to none.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1968.

[3] There was a covenant not to compete in petitioner's agreement with Forrest T. Jones (Pet. A36). The Commissioner did not contend that any part of the $50,000 paid for petitioner's stock should be apportioned to this covenant. Contrary to the legal theories in the petition, however, such an allocation would have been appropriate, if the evidence showed the covenant had distinct value. *E.g.*, *Annabelle Candy Co.* v. *Commissioner*, 314 F. 2d 1 (C.A. 9). The cases cited in the petition are not in conflict with this proposition. They simply apply it to different records, either sustaining or rejecting such an allocation, according to the facts of the particular cases.

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